

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5587R

DATE FILED: Oct. 27, 2004
DATE ACTIVATED: Sept. 12, 2005
DATE OF NOTIFICATION: Nov. 3, 2004
LAST RESPONSE REC'D: Dec. 20, 2004

EXPIRATION OF SOL: Oct. 2009

COMPLAINANT:

John A. Miller, Ph.D.

RESPONDENTS:

David Vitter for U.S. Senate and William
Vanderbrook, in his official capacity as
treasurer

McRei, Inc.

RELEVANT STATUTES:

2 U.S.C. § 441d
11 C.F.R. § 100.26
11 C.F.R. § 100.28
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

I. INTRODUCTION

This matter concerns two polls that did not contain disclaimers, but were paid for by a candidate's authorized committee, David Vitter for U.S. Senate ("the Committee"). The polls were conducted by a commercial polling and voter identification company, McRei, Inc. ("McRei"). The Committee acknowledges that the calls did not contain a

1 disclaimer, but asserts that a disclaimer was not required because the survey did not
2 contain any advocacy (express or otherwise) and because providing a disclaimer
3 associating the calls with the Committee would have impacted the results.

4 Based on a review of the available information and the Federal Election
5 Campaign Act of 1971, as amended ("the Act"), we recommend that the Commission:
6 (1) find reason to believe that David Vitter for U.S. Senate and William Vanderbrook, in
7 his official capacity as treasurer, violated 2 U.S.C. § 441d by failing to include a
8 disclaimer on the calls; (2) find no reason to believe that McRei, Inc. violated the Act and
9 close the file as to this respondent
10

11 **II. FACTUAL AND LEGAL ANALYSIS**

12 **A. The Calls**

13 The relevant facts in this matter are not disputed. McRei was hired by the
14 Committee to conduct telephone polling prior to the November 2004 Senatorial election.
15 Response, pp. 2, 3.¹ Two such polls are at issue in this case. One poll consisted of
16 advocacy and voter identification calls. At the beginning of each call, the callers
17 informed the recipient that s/he was "working with the David Vitter for U.S. Senate
18 Campaign." Response, Ex. A. The caller then explained, "I have decided to work to
19 elect David Vitter because he has worked hard to bring good jobs to Louisiana[,] . . . has
20 a concrete record of fighting political corruption [a]nd fully supports the Bush tax cuts;"
21 asked the recipient of the call if "David Vitter [can] count on your vote on election day;"
22 and asked what issue the recipient considered to be the most important issue facing our
23

¹ One response to the complaint was submitted on behalf of both the Committee and McRei

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1 nation today Response, p 2 and Ex. A. The caller ended by stating, "Thank you for
2 your time and we really do hope you will consider David Vitter for U.S. Senate when you
3 go to vote " Response, Ex. A.

4 A second group of calls are referred to as the "Undecided" poll calls. It appears
5 from the Response that the recipients of these calls were individuals who indicated in the
6 first set of calls that they had not yet decided for whom they intended to vote. Response,
7 p. 2. In the "Undecided" poll calls, the caller stated that s/he was from "PJB Media
8 Research," simply asked the recipient, "In the U.S. Senate Race (sic) in November are
9 you more likely to vote for," and then listed the names of the candidates, including David
10 Vitter. Response, Ex. B. The caller was instructed to rotate the order of reading the
11 candidates' names when making the calls Response, p. 3. It is alleged that the callers
12 were instructed to use a fake name to identify themselves personally, in addition to using
13 the name PJB Media Research. Complaint, pp. 2-3. PJB Research is a d/b/a of McRei.
14 Response, p. 3.

15 **B. The Act Required the Calls to Contain a Disclaimer**

16 The Act requires that political committees "making a disbursement for the
17 purpose of financing any communication ... through any other type of general public
18 political advertising" must place a disclaimer in the communication. 2 U.S.C. § 441d.
19 Furthermore, the regulations state that any "public communication" for which a political
20 committee makes a disbursement must contain a disclaimer. 11 C.F.R. § 110.11. A
21 public communication includes a communication by telephone bank to the general public.
22 11 C.F.R. § 100.26. A telephone bank means that more than 500 calls of an identical or
23 substantially similar nature were made within a 30-day period. 11 C.F.R. § 100.28. The

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1 Explanation and Justification discussing the disclaimer regulations implementing the
2 2002 Bipartisan Campaign Reform Act ("BCRA") amendments to the Act also make
3 clear that a telephone bank is considered a type of general public political advertising.
4 See 67 Fed. Reg. 76962, 76963 (Dec 13, 2002) ("each form of communication
5 specifically listed in the definition of 'public communication,' as well as each form of
6 communication listed with reference to a 'communication' in 2 U.S.C. 441d(a), must be a
7 form of 'general public political advertising'") Therefore, any candidate, political
8 committee or their agent(s) making any disbursement for telephone bank calls must
9 include a disclaimer on the calls.

10 The disclaimer must be presented in a "clear and conspicuous manner" in order to
11 give the listener "adequate notice of the identity of the person or political committee that
12 paid for and, where required, that authorized the communication." 11 C.F.R.

13 § 110.11(c)(1). A disclaimer, if paid for and authorized by a candidate or an authorized
14 committee of a candidate, must clearly state that the communication has been paid for by
15 the authorized political committee. 11 C.F.R. § 110.11(b)(1).

16 Here, the number of calls made and the time period in which they were made are
17 not alleged. However, the information provided by the Committee and reflected in the
18 Committee's disclosure reports to the Commission lead us to believe more than 500 calls
19 were made within a 30-day period. An October 16, 2004 report titled, "Daily Campaign
20 Figures," which is described by the Committee as the "Undecided callback report" (and
21 therefore presumably is a compilation of the "Undecided" poll calls) indicates that 3,289
22 responses were compiled by McRei on that day, which implies that at least that number
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of calls were made on that day² Response, Ex. C. Furthermore, according to the Committee's disclosure reports filed with the Commission, the Committee made the following payments to McRei for "phone banks:" \$50,000 on September 7, 2004; \$110,000 on October 18, 2004; \$130,000 on October 25, 2004; \$48,257.21 on November 15, 2004. The fact that the payments indicate a substantial portion of McRei's work for the Committee was paid within a limited time period (fourteen days), makes it likely that a large number of calls were placed within a similarly limited time period. Finally, the respondents did not deny that they made 500 calls nor did they deny that the calls were made over a 30-day period. Based on all of that information, it seems likely that McRei made more than 500 calls on behalf of the Committee within a 30-day period.

BCRA, the regulations promulgated in accordance with the new BCRA disclaimer provision, and the Explanation and Justification of those regulations make clear that disclaimers are required on any phone bank communications for which a political committee makes a disbursement. The Committee acknowledges that it paid for both sets of calls. In the first set of calls, the caller simply stated s/he was "working with" the Committee, but did not state that the Committee paid for the calls. As such, those calls did not comply with the disclaimer provisions of the regulations and the Act. The second set of calls did not contain any disclaimer at all. Accordingly, those calls also violated the disclaimer provisions of the regulations and the Act.

² The information provided as part of that Exhibit is a bit unclear because the supporting documentation appended to the Exhibit does not provide the same information. The supporting documentation only provides information about 272 true "undecideds" and 436 "Vitter persuadeds" calls, but even that total would demonstrate that more than 500 calls were made on one day

C. The Committee's Response

In its Response, the Committee does not address the first set of calls at all. With respect to the second set of calls, the "Undecided" poll calls, the Committee claims that a disclaimer was not required because the "Undecided" poll calls contained "[n]o express advocacy, no political advertising, no persuasion, no solicitation and no preference for any Senate candidate." Response, p. 3. The Committee also explained that "[t]he Commission has historically adhered to an industry standard reflecting the principle that telephone calls solely in the nature of opinion polling which do not expressly advocate a candidate or indicate any candidate preference are not considered 'advertising' subject to the regulations requiring disclaimers." Response, p. 3. The Committee claims that "[n]othing in the [2002] amendments to the Act . . . altered this principle." Response, p. 4.

Whether or not the Committee's characterization of pre-BCRA practice is correct, the Committee does not correctly state the current law. As discussed above, BCRA and its implementing regulations make clear that disclaimers are required on these communications. Indeed, prior to BCRA and the regulations thereunder, it was unclear that phone bank communications of any type were covered by 2 U.S.C. § 441d; thus, it is not surprising that the Commission pursued no enforcement matters involving polling phone banks.³

³ Page 3 of the Response cites AO 1999-27 in support of its contention that the Commission's pre-BCRA policy was not to require disclaimers on committee-funded opinion polls. However, that opinion concerned a presidential preference "straw poll" held in conjunction with a state party's precinct caucuses that began the process of selecting the state's delegates to the party's national convention. The "straw poll" was an event, not a communication, and there was therefore no suggestion in the opinion that it required a disclaimer. Thus, AO 1999-27 is entirely inapposite to this matter, and does not stand for the proposition for which respondents cite it. The Commission did hold in AO 1999-27 that, in the absence of express advocacy, advertisements urging voters to attend the caucuses and participate in the straw poll would not

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1 The Committee also claims that including a disclaimer in the calls could have
2 affected the poll results because recipients of the calls might have given different answers
3 if they were made aware that the calls were not coming from a neutral source. Response,
4 p. 2. However, the first set of calls identified the Committee (albeit not in a "paid for by"
5 disclaimer), but the Committee still utilized the resulting information. Furthermore, in
6 the second set of calls, there is no requirement (other than that the disclaimer be clear and
7 conspicuous) as to when in the call the Committee should have included the disclaimer.
8 *See, e.g.*, 11 C.F.R. § 110.11(c)(2)(iv) (stating that a disclaimer need not appear on the
9 front or cover page of a printed communication). Finally, even assuming the
10 Committee's claim is true, the Act and regulations do not make an exception for polling
11 calls based on the possible effect on the results, and therefore compliance with the law
12 requires a disclaimer stating that the Committee paid for the polls.

13 Therefore, for all of the above reasons, we recommend that the Commission find
14 reason to believe David Vitter for U.S. Senate and William Vanderbrook, in his official
15 capacity as treasurer, violated 2 U.S.C. § 441d.

16 **D. McRei**

17 Section 441d places liability for placing a disclaimer in a political advertisement
18 on the committee, individual or entity that makes a disbursement for the calls. Here,
19 McRei was solely acting as a vendor and has no liability under the Act for the violation
20 of section 441d. Accordingly, we recommend that the Commission find no reason to
21 believe that McRei violated the Act and close the file as to it.

require a disclaimer, but that conclusion had nothing to do with polling, no pre-BCRA communication required a disclaimer absent express advocacy.

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1 **III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

11 **IV. RECOMMENDATIONS**


- 12 1. Find reason to believe that David Vitter for U.S. Senate and William
13 Vanderbrook, in his official capacity as treasurer, violated 2 U.S.C.
14 § 441d.
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16 2. Find no reason to believe McRei, Inc. violated the Act and close the file as
17 to it.
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19 3.
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23 4. Approve the attached Factual and Legal Analysis.
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25 5.
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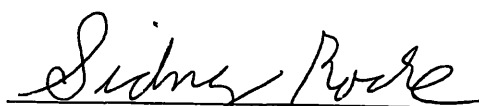
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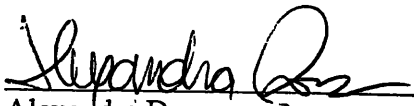
6. Approve the appropriate letters.

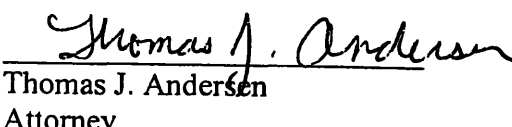
Lawrence H. Norton
General Counsel

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Date


Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement


Sidney Roche
Assistant General Counsel


Alexandra Dumas
Attorney


Thomas J. Andersen
Attorney

Attachments:

- 1.
2. Factual and Legal Analysis